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IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 500 MISC.

GEORGE COLE and GEORGE HICKS,
Petitioners,

vs.

THE STATE OF NEW JERSEY,
Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF OPPOSING PETITION FOR CERTIORARI.

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BRIEF OPPOSING PETITION FOR CERTIORARI.

I.

Reference to Official Report of Opinion delivered in the court below.(*)

The opinion of the New Jersey Court of Errors and Appeals, the court immediately below, which affirmed the judgment of conviction in the Court of Oyer and Terminer for Essex County, New Jersey, is officially reported at *136 N. J. L. 606, 56 Atl. R. (2d) 898.*

II.

Counter-Statement Concerning Jurisdiction.

Counsel for petitioners state (petitioners' brief, p. 2) without any elaboration, that the jurisdiction of this Court

(*) Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief, refer to pages of the printed record of the court below.

is invoked under Section 237(b) of the Judicial Code, as amended.

We respectfully submit that the decision of the New Jersey Court of Errors and Appeals in this case involving the questions presented in the petition is in conformity with the provisions of the Federal Constitution[1] respecting due process and equal protection of the laws as guaranteed by the United States Constitution, and that the said Court did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decision of the Court below.

III.

Counter-Statement of the Case.

The petitioners, George Cole and George Hicks, together with one Chauncey Harris, were tried and convicted of murder in the first degree. The petitioners were sentenced to death, and Harris was sentenced to life imprisonment upon recommendation of the trial jury (permissible under New Jersey law).[2]

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[1] Constitution of the United States, Amendment XIV, Section 1.

[2] New Jersey Revised Statutes, Title 2, Chapter 138, Section 4:

> "Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed. Every person convicted of murder in the second degree shall suffer imprisonment at hard labor not exceeding thirty years."

The crime was the killing of one Morris Rudominer in the attempt to commit robbery.[3] The deceased was the proprietor of a drug store at 102 Waverly Avenue, Newark, and on the evening of September 12, 1946, while he was alone in his store, three Negroes entered and proceeded to rob him. There were no eye-witnesses to the crime, but a Negro woman, Mrs. Juanita Brandon, who happened to be passing on the sidewalk, glanced through the front window and saw a Negro man "messing around the cash register, as though he was trying to get it open," (R. 919, 920). Sensing something wrong, she called to three Negro men standing in front of the adjoining premises, at No. 100. One of these men, named Adams, responded to her call, and he and Mrs. Brandon entered the store. As they were entering, two Negroes brushed past them in making their escape from the premises. Mrs. Brandon testified she could not identify either of them, except that one was wearing an Eisenhower jacket, (R. 920). Adams stated that one was wearing an Eisenhower jacket and that the other wore a red and black checked shirt, but that he did not get a good look at them, (R. 930). Adams called to two of his companions, Deans and White, in front of the premises next door, and that he and White took up the chase of the two men seen leaving the drug store. The chase continued for a very short distance, and the two fleeing men made good their escape. They did not get a look at their faces.

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[3] New Jersey Revised Statutes, Title 2, Chapter 138, Section 1:

> "If any person, in committing or attempting to commit arson, burglary, rape, robbery, sodomy or any unlawful act against the peace of this state, of which the probable consequences may be bloodshed, shall kill another; or if the death of anyone shall ensue from the committing or attempting to commit any such crime or act as aforesaid; * * * then such person so killing as aforesaid shall be guilty of murder."

In the drug store Rudominer was found on the floor bleeding and unconscious, and he was helped to a chair in the rear room. A number of police arrived on the scene in response to a radio police alarm. Rudominer could answer no questions, merely mumbling and holding his head. Behind the counter several drawers were pulled out; a cigarette case was found disturbed, and cigarettes were strewn over the floor. Rudominer had a bleeding wound over the left eye and another in the back of his head. Quickly removed to a hospital, he never regained consciousness and died three days later. Autopsy showed a fracture of the skull and a cerebral hemorrhage; a lacerated internal wound over the left eyelid; with a depressed composite fracture of the left temporal region; a linear fracture of the right temporal region probably caused, according to the medical examiner, "by a man stamping with his shoe on the forehead," (R. 86).

The crime remained thus unsolved until the following December 7, when the following events took place:

At about 3:30 A. M. the morning of December 7, Harris was picked up by Newark police on a street in Newark in possession of a stolen car. He was placed under arrest and taken to Police Headquarters for questioning in connection with the stolen car. The following morning, under questioning, not only did he admit participation in the stolen car, but he admitted participation in an assault and battery case in another county, the preceding night, and also a series of stickups and robberies he committed with others in Newark and surrounding municipalities in Essex County over a considerable period, which crimes had gone unsolved, and which were still open in the police records, (R. 750, 751). He named specific places where the robberies had been committed, saying "there were other jobs, but he could not

remember the times and places," (R. 755). As a result of these disclosures he was turned over to the Bandit Squad of Newark Police Headquarters, whose principal concern was the solution of crimes such as stickups, robberies, burglaries, and the like.

Acting upon information given the police by Harris in connection with numerous robberies as well as the Rudominer crime, members of the Bandit Squad, on the evening of December 7, took Harris with them on a tour of the city in search of these petitioners, Cole and Hicks, as well as one Clarence Wright, also implicated by Harris, visiting various places where they might be found, as Harris was going to point them out, (R. 117). After several hours' search they proceeded to the petitioners' homes, Harris making the identification, and Cole and Hicks were placed under arrest. Cole was taken to a Police Precinct Station, and Hicks was taken to Police Headquarters. It was 4:30 the morning of December 8 when all three were placed under detention.

There was no questioning or investigation of any kind undertaken by the police during Sunday, December 8, the investigation being resumed on Monday morning, December 9th, at which time the police undertook to sift out and complete their investigation in regard to the series of robberies and burglaries admittedly committed by Harris together with the petitioners Cole and Hicks, and in such other crimes in which the petitioners had been implicated by Harris.

Police investigation on December 9 resulted in Harris giving the police 7 written statements relating to other crimes, and not connected with the Rudominer crime, (R. 121, 122). Petitioner Hicks also gave the police 14

written statements on other crimes, not related to the Rudominer killing (R. 124). Police testified at the trial that their questioning of the prisoners, arranging for various lineups, bringing in the victims to view the lineups, and the typing and notarizing of the numerous statements taken in all these other cases had consumed all of Monday, December 9 until early the morning of December 10, (R. 140). After all of these statements of Harris and Hicks had been completed, Cole was brought to Police Headquarters from the Police Precinct Station for questioning on the morning of December 10th, and he gave the Bandit Squad 8 written statements on other crimes not related to the Rudominer killing, (R. 126).

Once all the statements on these other crimes had been completed, the Bandit Squad proceeded to take down the confessions of all three with respect to the Rudominer robbery. Lieutenant Flynn of the Bandit Squad testified, "We didn't take anything on this crime until we had the other statements first, although the first crime that was admitted by Hicks was this crime," (R. 126).

Harris' confession to this crime was the first to be taken down. It was begun at 1:45 A.M. and completed at 4:00 A.M. of December 10th, (R. 141).

The confessions of petitioners, Cole and Hicks, were taken in the afternoon of December 10th, the same day, and thereafter they were turned over to the Homicide Squad of the Newark Police.

On the evening of December 10th, the County Prosecutor, his first assistant, and members of the Prosecutor's Homicide Bureau called at Police Headquarters for further questioning of the prisoners. In their presence the Police Chief requested Cole to give his version of what took place in Rudominer's store at the time of the crime. Cole re-

peated substantially the same story he had given in his confession to the Bandit Squad. Upon being asked by the Police Chief as to the kicking of Rudominer, he at first said he did not know, but he did admit that he had slugged the druggist with his fist. Harris was then brought in, and the Chief asked him who kicked the druggist, to which Harris replied that Cole did. Cole, after some hesitation, admitted that he had kicked the druggist. Not being satisfied with this statement, the Chief had Hicks brought in and he asked the same question with respect to Cole's action, to which Hicks replied that Cole kicked the druggist. Whereupon, Cole said, "All right, yes, I did kick him. That's so," and again he said, "Yes, I kicked him with my—I didn't kick him, I stomped him with my right foot," (R. 817, 818, 894). The Chief then placed a book on the floor and asked Cole to give a demonstration, using the book in place of the victim's head, of how he committed the act, and Cole came down on the book with his foot to show the manner in which he had stomped Rudominer on the face and head, (R. 818). He gave another demonstration immediately thereafter with the Prosecutor's Detective-Captain as the subject, by placing his foot upon the side of the head where he had stomped Rudominer. Thereafter he turned to the County Prosecutor and asked, "Mr. Prosecutor, will I get the electric chair for this?" to which the Prosecutor replied, "I can't tell you that. That is up to a judge and jury," (R. 819).

Immediately following this demonstration, all three defendants gave written confessions. These confessions were started at the same time and taken separately by members of the Prosecutor's Homicide Bureau and Newark Homicide Squad, in plain view of persons in and about Headquarters at the time. All of these confessions were completed shortly past midnight on December 10th, the

last of the three having been finished at 1:40 A. M., December 11th[4] (R. 1241, 1248, 1256).

Harris, in his confession, stated that he together with petitioner Hicks and Clarence Wright had "cased" the drug store, that is, had planned to rob the drug store on the afternoon of September 12, that they changed their minds about committing the crime at that time because of possible identification, and that they planned to return that same evening to do the job. On the occasion of the afternoon visit to the drug store, Harris went into the store and, in looking the store over, purchased some foot powder which would necessarily draw the proprietor from behind the counter. He stated that because Wright had failed to put in an appearance at the appointed hour, he and Hicks induced petitioner Cole to join them, and that these three, Harris, Cole and Hicks, did actually commit the crime.

The confessions of all three contained a detailed description of the occurrences in the drug store during the course of the attempted robbery and the killing of Rudominer, and the part that each played in the crime. Briefly, they contained these facts: Cole and Harris walked into the store together, and Hicks followed them immediately behind. Harris went to the telephone booth, near the front window. Rudominer, the proprietor, was alone in the store, and Cole made a pretense to purchase some of the same foot powder which he knew would draw the proprietor from behind the counter. As the proprietor approached, Cole struck him a blow with his fist causing him to fall to the floor. Cole rushed behind the counter and went to the cash

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[4] The written confessions given to the Newark Bandit Squad were received in evidence at the trial as Exhibits S-15, 16 & 17 (R. 1218 to 1234); and the written confessions given to the Prosecutor's Homicide Bureau and the Newark Homicide Squad were received as Exhibits S-26, 27 & 28 (R. 1235 to 1257).

register. Hicks joined him behind the counter and proceeded to rifle through the drawers. Meanwhile, the proprietor who apparently had been stunned by the blow of Cole, was making an effort to arise from the floor. Hicks upon noticing the proprietor attempting to get up from the floor, called out, "Look out, he's getting up." Cole thereupon came from behind the counter and went to the proprietor. As Rudominer was lying on one elbow, Cole "stomped" him on the side of his head with the heel of his shoe, causing Rudominer to fall back on the floor unconscious. Without taking anything, the three made good their escape.

During the process of the taking of the confessions in Police Headquarters on the night of December 10th, all three were questioned by two persons other than police officers. These were Dr. Greifinger, Assistant Police Surgeon, and Walter E. Fenderson, a Negro disinterested citizen-witness.

Upon the completion of all of the confessions by the three defendants, Dr. Greifinger made separate physical examinations of each of them and found no signs of recent injuries. The doctor testified that petitioner Hicks told him he had made a voluntary statement and that "nobody touched him," (R. 859); that petitioner Cole likewise had made a voluntary statement and the police "did not beat him or even touch him," (R. 863).

The citizen-witness Fenderson testified that he personally interviewed each of the prisoners as to the manner of treatment they received at the hands of the police, and that he was there "primarily interested in them," and "to protect them as much as anybody else," (R. 883). In response to his inquiry of each one as to how they were treated, they said, "O.K.; all right," (R. 883).

Following the taking of confessions of the three defendants by members of the Prosecutor's Homicide Bureau and Police Homicide Squad, which were completed in the early morning of December 11th, the petitioners were detained at Police Headquarters through December 11th and 12th. During this time, in addition to fourteen lineups held in connection with fourteen separate robbery complaints in which defendants were implicated, there were two further lineups held in connection with the Rudominer murder, one at 8:00 P. M. on December 11th, and the second on December 12th at 1:42 P. M., to permit various persons who had been at or near the scene of the Rudominer crime, both at the time of the commission and during the flight of the perpetrators, to view these defendants in different lineups along with others, to afford such witnesses as they arrived at Police Headquarters an opportunity to determine whether they could make an accurate or positive identification of any of those viewed in the lineups as the perpetrators of the Rudominer killing.

At the first of these lineups, which was witnessed by Mrs. Brandon, who was passing Rudominer's store at the time of the crime and who glanced through the window, as well as Adams, White and Deans, who were standing in front of the adjoining premises, none of these witnesses could make any positive identification. However, while the witness Deans was viewing the lineup, Harris told the police that he recognized Deans as one of the men he had seen standing in front of Rudominer's drug store on the night he and the petitioners entered the store for the purpose of the intended robbery. Harris further stated to the police that he had known Deans in the Summer of 1945 in Pearl Harbor just before leaving for home on his return from military service. As a result of these disclosures,

Harris gave the Police a supplemental written statement covering the same (R. 1256-1257).

All three of the defendants were charged by complaint with murder and arraigned on the morning of December 13 in the Fourth Precinct Police Court. The arraignment was not only on the murder charge, but also on the numerous charges for the series of other crimes which they admitted to the police, and which the police had been investigating from the time of their arrest (exclusive of Sunday, December 8th).

At the arraignment, pleas of not guilty were entered by all on the murder charge. (Under New Jersey law, a plea of not guilty must be entered in a homicide case, and any plea of guilt cannot be received in evidence at the trial.)

As to the other charges, Harris entered pleas of guilty to eight; petitioner Hicks entered guilty pleas to eleven alleged stickups, (R. 599); and petitioner Cole entered pleas of guilty to six such other charges, (R. 703).

Following their arraignment all three were immediately remanded to the county jail to await action of the Grand Jury and trial.

It must be borne in mind that as a result of investigation and questioning during this period the petitioners were charged, either singly or in combination, with seventeen crimes involving armed robbery and murder. The petitioner Cole gave ten statements and the petitioner Hicks seventeen statements involving separate crimes in which they were implicated.

The petitioners have long criminal records involving convictions for high misdemeanors including among others, armed robbery, and were on parole at the time of the commission of the Rudominer killing. Between them they have

a total of unexpired sentences from which they were then on parole totalling one hundred and twenty-four years.

The petitioner Hicks was first questioned on Monday, December 9th. The petitioner Cole was not questioned until Tuesday, December 10th.

After the taking of the murder confessions, which followed the many others concerning separate crimes, and which were completed in the early hours of December 11th, as above noted, there were sixteen different lineups, fourteen of which were in connection with separate crimes. These lineups, plus the time consumed in completing the necessary paper work in connection with the drawing of separate complaints and commitments as to each offense with which petitioners were charged, both separately and jointly and in combination with other defendants, plus necessary police reports and checking of statements, reports and criminal records, consumed all of the intervening time until the arraignment on the morning of December 13th upon the numerous charges including that for murder as above noted.

IV.

Summary of the Argument.

We respectfully submit:

First: The petitioners were not deprived of the equal protection of the laws because of any alleged systematic or intentional exclusion of Negroes from jury service; and the Court of Errors and Appeals, the court of last resort in New Jersey, did not decide the question in a manner contrary to the decisions of this Court.

a. The record is devoid of any proof of systematic or intentional exclusion of Negroes either from the major jury

lists selected from the county voting lists, or exclusion from the general panels made up from such major lists, or from the special panels from which the trial jury was drawn.

b. While the challenge to the array of jurors was based upon alleged intentional exclusion of Negroes charged to the officials having jury-selecting functions, this claim was abandoned by petitioners' counsel in the discussion before the trial court, and the complaint was made that the procedure followed resulted in a disproportional representation of Negroes on juries.

c. Petitioners conceded in open court that there always have been at least five Negroes on each general panel of 200 during the period of the last five or six years.

d. Petitioners were properly precluded from attempting to show any disproportional representation through a Negro court-attendant then serving in the court room. However, they were permitted by the trial court to use the court-attendant to attack the credibility of the jury-selecting officials who had testified, and petitioners declined to do so.

e. Petitioners were not precluded from showing any alleged disproportional representation by competent evidence as having any bearing upon the question of systematic or intentional exclusion.

f. Petitioners submitted no data or figures on the comparative numbers of members of the Negro and white race in the County, nor as to the percentage that the number of persons of each race serving on juries bears to the number of each race in the total County population.

SECOND: There was no violation of due process in the taking of petitioners' confessions.

a. The confessions were voluntary as construed by the law of New Jersey.

b. The New Jersey Court of Errors and Appeals properly approved of the trial court's action in receiving petitioners' confessions in evidence, and it did not decide any Federal Constitutional question of substance in a manner contrary to the decisions of this Court.

V.

The Argument.*

POINT ONE.

a. There was no systematic or intentional exclusion of Negroes from the jury lists from which the jury was drawn to try the petitioners.

b. The petitioners failed to prove any systematic or intentional exclusion of Negroes by officials charged with the duty of jury-selecting; and they were not precluded from attempting any such showing by competent and relevant evidence.

c. The New Jersey Court of Errors and Appeals properly sustained the trial court's action in overruling petitioners' challenge to the array of jurors; and it did not decide any Federal Constitutional question of substance in a manner contrary to the decisions of this Court.

Before trial, petitioner Cole filed a written challenge to the array of jurors chosen on the panel to try the indictment. The ground stated in the challenge was that "those

* The argument in this Brief (in compliance with Rule 27) is made as summary and concise as possible.

charged . . . with the duty of drawing such panel deliberately avoided calling the sufficient persons of the colored race, knowing that the defendant was colored, to enable the defendant to be tried by an impartial jury, and because of bias and prejudice against such defendant." (R. 37.)

In the preliminary discussion on the challenge before the trial court the argument turned upon the question of whether there was a "deliberate exclusion" of all Negroes, as follows, (R. 39):

> "The Court: All right, as long as you did not have any particular number in mind. Your point is to prove deliberate exclusion?
>
> "Mr. Carey: Yes. It is completely impossible, the way the panel was picked, and deliberately so, to enable these men to get the fair trial that they seek."

In the course of the discussion, counsel abandoned their original claim of exclusion of Negroes, and urged that there had not been a proportional representation of Negroes on the panel, stating, "We don't charge that there has been a definite attempt, but we do feel that there should be more than one in a special panel, and more than four in a general panel of 200, and I do believe we should be allowed to go into that question." (R. 41.)

The trial court thereupon permitted the petitioners to submit their proof of the latter allegation. Petitioners called to the stand William H. Butler, the Sheriff of the county and who is one of the two Jury Commissioners charged under the law with the duty of supervising the selection of grand and petit jurors. The Sheriff testified, in substance, that the panels were drawn in accordance with the law, the names of prospective jurors being drawn from the county voting lists in alphabetical order and appor-

tioned among the various wards of the City of Newark and all of the other municipalities of the county. (R. 46.)

Following is an example of the method used, as described by the Sheriff:

> "* * * In other words, we start with the A's and a certain group of A's are picked from every ward of the City of Newark and every municipality of the County of Essex, and when we exhaust the A's we start on the B's and use the same process." (R. 46)

The next step in the procedure, as described by the Sheriff, was the checking of the names thus selected with the County Identification Bureau for the purpose of eliminating those with criminal records.

The Sheriff further stated that the proportion of Negroes thus selected in relation to the entire number drawn could not be ascertained because, "We don't check them as to race, color or creed," and he had no way of telling how many Negroes would be selected by the method pursued. (R. 48 to 50.)

> "By the Court:
>
> Q. As I understand it, when you get this major list, you have no means of telling whether they are white or colored or yellow or what? A. None whatsoever."

The Sheriff testified that he could not tell the proportion of Negroes struck from the major list on account of criminal record, and that no one was struck from such list because of being a Negro:

> "We wouldn't strike anyone because he was a Negro" (R. 51).

Petitioners next called Fred W. Mitchell, Executive Clerk to the Jury Commissioners, and he corroborated the

Sheriff as to the method of procedure employed in selecting names from the voting lists. He also stated there was no way of knowing whether the persons thus selected were white or colored; that he could not ascertain from the method of selection what the proportion was as between the respective races; and that he made no particular personal observation as to whether any more than five Negroes were included in any panel of 200 during the six years he had held office (R. 54 and 55). He made specific denial of any deliberate attempt to exclude Negroes from the lists:

> "Q. Mr. Mitchell, do you know of any deliberate attempt to exclude any person or any members of the colored race from the jury list drawn in Essex County? A. There is none whatever. In fact, we try to get as many on as we can" (R. 58).

Petitioners then requested that a Mr. Collins be called to testify. Collins was a Negro Court-Attendant serving in the courtroom where the trial was had, and had been such for a number of years. When asked what the purpose of his testimony would be, petitioners' counsel stated they proposed to show his observation as to the "percentages" of Negro jurors on jury panels over the period of "the last five or six years," (R. 59). In the ensuing discussion as to the competency of such evidence, the trial court made the statement that the court attendant would not be able to show any deliberate exclusion on the part of the officials who already had testified, but that he might be called for the purpose of attacking the credibility of their testimony, and the trial court gave petitioners the opportunity of so doing, (R. 60 to 62).

> "The Court: If you press it as an attack on the credibility of the testimony, you may proceed. Otherwise not" (R. 62).

Counsel then admitted that there were at least five Negro jurors on a panel of 200; that they did not propose to attack the credibility of the officials who had testified; but that they wanted to show that the result was "unfair" as to the number drawn, stating, "we don't want to place ourselves in the position where we definitely say we attack the credibility. We want to show that the result of the drawing is unfair because, as I say, we can show by the witness whom I wanted to call that the average number in a panel of 200 is only five" (R. 62).

Counsel abandoned their intention of calling Collins, the court attendant, and refrained from calling any other witness, whereupon the trial judge made the following significant statement:

> "The denial of due process to which you refer must be based here upon a wilful, deliberate action of the administrative authorities, and mere probabilities cannot overcome the strict undenied testimony that there was no wilful, deliberate act, unless, as I say, you represent that you wish to attack the credibility of that testimony. You must say right now which it is" (R. 62).

We respectfully submit that the court attendant's testimony could have had no direct bearing upon the question of systematic, wilful or deliberate exclusion of Negro jurors allegedly charged to the officials. At best, he could have attacked the credibility of the officials' testimony, but petitioners chose not to do so.

There were admittedly Negro jurors drawn, at least five, on a panel of 200.

Petitioners made no attack on the method used by the officials, nor did they complain that the officials had violated their obligations.

The officials undertook to select the prospective jurors in alphabetical order without regard to the number of persons of the various races who might appear on the list.

The number of Negroes selected from the voting lists could not be ascertained from the records of the lists, as there was no notation on the lists as to color.

There was no proof offered to show the respective number of members of the Negro and white races in Essex County, and no evidence as to the percentage that the number of persons of each race serving on juries bears to the number of each race in the total population of the County.

We respectively submit that the New Jersey Court of Errors and Appeals properly upheld the trial court's action in overruling the challenge to the array when it stated:

> "The plaintiff-in-error was afforded every opportunity to prove a systematic or intentional limitation of representation of Negroes on the panel. The proofs failed to establish such a limitation. A similar situation was considered and approved by this court. State *v.* Simmons, 120 N. J. L. 85, 198 A. 294."[5]

It has been established by this Court that the mere fact of inequality in number of jurors selected as among the various races does not in itself show discrimination; and that to sustain a charge of denial of due process there must be shown to be present a purpose to discriminate, which purpose may be substantiated by proof of a systematic exclusion of Negroes or by an unequal application of the law to such an extent as to show intentional discrimination.

Fairness in the selection of jurors has never been held to require a proportional racial representation on the jury.

> *Akins* v. *State of Texas*, 325 U. S. 398;
> *Thomas* v. *Texas*, 212 U. S. 278;
> *Virginia* v. *Rives*, 100 U. S. 313.

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[5] *State* v. *Cole, supra*, 136 N. J. L. at p. 613, 56 A. (2d) at p. 903.

In *Akins* v. *State of Texas, supra,* the discrimination complained of consisted of an arbitrary and purposeful limitation by the Grand Jury Commissioners of the number of Negroes to one member on a grand jury panel of 16 for the term at which the indictment against the petitioner was found. This Court found that the regular statutory practice for selection of grand jurors had been followed, stating in its opinion, (325 U. S. on page 403; 65 S. Ct. on page 1279):

> "... Fairness in selection has never been held to require proportional representation of races upon a jury. (cases cited). Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.' (citing Hill *v.* Texas, 316 U. S. 404). Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized. (citing Norris *v.* Alabama, 294 U. S. 587; Hill *v.* Texas, 316 U. S. 404; and Smith *v.* Texas, 311 U. S. 128). The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal appli-

> cation of the law to such an extent as to show intentional discrimination. Cf. Snowden *v.* Hughes, 321 U. S. 1, 8, 64 S. Ct. 397, 401, 88 L. Ed. 497. Any such discrimination which affects an accused will make his conviction unlawful."

Cases cited by petitioners in support of their contention under Point I (petitioners' brief pp. 16-18), we submit, are not applicable to this case. Our examination of those cases discloses that the denial of due process as found therein stemmed from the arbitrary and systematic exclusion of Negroes resulting either from statutory enactments or as the result of the practices of the officials charged with the function of selecting juries.[6]

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[6] In *Brunson* v. *North Carolina*, 333 U. S. .....; 68 S. Ct. 634, this Court reversed, *per curiam* and without opinion.

In *Patton* v. *State of Mississippi*, 332 U. S. 463, there was evidence introduced before trial and "without contradiction" to the effect that no Negro had served on the grand or petit jury for 30 years or more, although the adult population of Negroes was more than one-third of the adult population of the county. In concluding that petitioner had been denied due process and equal protection, this Court held that it was erroneous for the State courts to conclude that there was a failure of proof of systematic racial discrimination by considering only that there were no Negroes on the particular venire lists from which the juries were drawn that indicted the convicted petitioner without also considering the "key fact" that for 30 years or more no Negro had ever served on the grand or petit juries. This Court, in reversing the conviction, stressed the fact that such omission seriously detracted from the weight and respect that otherwise would have been accorded to the State courts' conclusion in reviewing the facts. The fact that for 30 years or more no Negro had ever served on either jury was held to be a strong showing of systematic exclusion because of race, and that in the face of such showing it became the State's duty to attempt to justify such exclusion, which the State failed to do. The fact that the State had failed to show that its officials had abandoned their old jury selection practices played an important part in the conclusion arrived at by this Court.

In *Strauder* v. *West Virginia*, 100 U. S. 303, there was clear discrimination in the statute which, in effect, singled out and denied to colored citizens the right and privilege of participating as jurors because of their color.

In *Pierre* v. *Louisiana*, 306 U. S. 354, 59 S. Ct. 536 (1939), the petitioner submitted the testimony of 12 witnesses including the Sheriff, Clerk of the Court, and a number of freeholders and householders, showing that from 1896 to 1936 no Negro had ever served on either the Grand Jury or Petit Jury of the Parish; that only on a single venire in 1936 the names of 3 Negroes had been selected, one of whom was then dead, another was listed under a wrong name, and the third had served. It was also shown that the Negro population was about equal to that of the whites in the Parish; that there were many Negro citizens who were legally qualified to serve, and that the majority of the Negro population were literate. There was no testimony of any kind submitted by the State to contradict or dispute this testimony. It was held by this Court that a *prima facie* case of racial discrimination had been made out by a showing that there were many colored citizens qualified and available for grand jury service; and that it could not be presumed that the State refrained from introducing evidence to contradict the inference to be drawn from that evidence if it had been obtainable.

In *Smith* v. *Texas*, 311 U. S. 128, 61 S. Ct. 164 (1940), the petitioner supported his claim of wilful discrimination by showing that 20% of the county population was Negro and almost 10% were poll tax payers; that there was a minimum of from 3 to 6 thousand Negroes who measured up to the statutory qualifications for grand jury service. The County Clerk testified for the petitioner that only 5 of the 384 grand jurors serving from 1931 through 1938 were Negroes; of 512 persons summoned only 18 were Negroes; that of these 18 the names of 13 appeared as the last name on the 16-man list, the custom being to select the first 12 names for actual service; that 5 of those not given last place on the list, 4 were given a number between 13 and 16, and only 1 was given position No. 6 on the list, with the result that only 5 Negroes had ever served on the Grand Jury, while 379 of the 494 white men summoned actually served; and that of 32 grand juries only 5 had Negro members while 27 had none; and that of these 5 the same individual had served 3 times, so that 3 individual Negro jurors had served at all during those years. The proof of service by Negroes on the grand jury during those years was as follows:—in 1931, 1; 1932, 2; 1933, 1; 1934, 1; 1935, none; 1936, 1; 1937, none; and in 1938 when petitioner was indicted, none. This Court held that the continuous omission of Negroes from Grand Jury lists for so long a period as 16 years or more could hardly have been accounted for by mere chance or accident.

In *Hill* v. *Texas*, 316 U. S. 400, 62 S. Ct. 1159 (1942), the proof submitted by petitioner in support of his motion to quash the indictment upon the ground of wilful discrimination was the testimony of two of the three Jury Commissioners who testified that they made no investigation or inquiry to ascertain whether there were any Negroes in the county who were legally qualified to act as grand jurors. One said he did not know of any qualified Negro who would make a good grand juror, while the other stated he did not know which of the Negroes he was acquainted with could read or write.

The recent case of *Moore et al.* v. *People of State of New York,* 68 S. Ct. 705 (March 29, 1948) is in point. There the petitioners were convicted of 1st degree murder by a jury drawn from a special jury panel (referred to as a "blue ribbon" jury), pursuant to New York law. One hundred and fifty names were drawn from the special jury panel under supervision of a State Supreme Court Justice in the presence of defendants' counsel and without objection.

In that case certain statistics were submitted to this Court, but not presented to the trial court, tending to show the ratio of convictions before special juries as contrasted with that before ordinary juries, and indicating that over a period of nine years 79% of the cases tried before special juries were convictions as against 57% of the cases tried before ordinary juries. This Court held that no question was presented here that had not already been disposed of in *Fay* v. *People of State of New York,* 332 U. S. 261, wherein it was held that a conviction by a "blue ribbon" jury did not violate constitutional guarantees.

Petitioner called an Assistant District Attorney who had lived in the county 27 or 28 years and who had served 16 years as a criminal court judge, and he testified that he never knew of any Negro being summoned to serve on the grand jury. The District Clerk testified he knew of no citation issued for a Negro to serve on the grand jury. A number of other citizen witnesses testified to the same effect. There was submitted to the court an estimate of the comparative populations, as follows: of a total county population of 398,564 there were 61,605 Negroes of whom only 7½ per cent were illiterate, and of those who were literate there was a considerable number who had attended high school and college. It was held by this Court that under the facts and circumstances of the case a *prima facie* case had been made out which the State failed to meet; that the Jury Commissioners had consciously omitted the placing of names of any Negroes on the jury list; that they made no effort whatsoever to ascertain whether there were within the county Negroes who were legally qualified to serve, and if so, who they were. They failed to perform their Constitutional duty. The discrimination was held to arise from the action of the Commissioners in excluding Negroes whom they did not know to be qualified, and failing to inquire whether there were qualified Negroes who were qualified for jury service.

The issue presented on the challenge before the trial court was squarely upon the question of whether there was intentional elimination or disqualification of women and Negroes on the special jury panel.

It was admitted that there was no Negro on the panel. Witnesses called to support the challenge testified that there was no practice or intent at discrimination, and there was nothing in the "background facts" to discredit that testimony. While it appears from a reading of the opinion that no estimate as to the Negro population in Bronx County was before the trial court, it is stated that census figures showed a proportion of Negro-to-white population of .7% in 1920, 1% in 1930, and 1.7% in 1940, and that since the last census it was estimated and admitted that the Negro population had considerably increased, the revised estimate being between 65,000 and 70,000 in 1948.

The official who compiled the jury list testified as to Negro jurors that from 1946 on he himself "must have examined at least 500." The number accepted for service could not be ascertained from the records, because there was no notation in the records as to the color of the persons therein named. However, he testified that probably two or three "dozen" Negroes had been accepted, and that he himself had personally examined an estimated 100 Negroes and that "maybe a dozen" of them had been accepted, which testimony was undenied.

This Court held that the record was utterly devoid of proof of systematic, intentional and deliberate exclusion of Negroes from jury duty.

Relying on the case of *Moore et al.* v. *People of the State of New York, supra,* the most recent pronouncement of this Court we have been able to find on the subject, (decided March 29, 1948), and following *Fay* v. *New York, supra,* it is respectfully submitted that petitioners fail to present

any substantial Constitutional question under Point I of their brief in support of their contention that there has been a denial of due process or equal protection of the laws by reason of systematic or intentional exclusion of Negroes from the jury lists from which the trial jury was drawn.

Petitioners first challenged the array upon the ground of deliberate exclusion of sufficient Negro jurors because of bias and prejudice. They abandoned their challenge on this ground and substituted the claim that there was a resultant disproportional representation of Negroes flowing from the usual procedure followed by the jury-selecting officials. Petitioners called these officials to the stand in an attempt to prove their claim, and their testimony was to the effect that there was no deliberate or intentional exclusion.[7] They then offered the court-attendant to show the small number of Negroes who actually appeared on trial juries, and the trial court advised that the court-attendant might be called to attack the credibility of the officials who had testified. This the petitioners declined to do, and they abandoned any further attempt to show deliberate and intentional exclusion.

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[7] Since 1884, in New Jersey the following statute has been in force and effect: New Jersey Revised Statutes, Title 10, Chapter 1, Section 8:

> "No citizen possessing all other qualifications prescribed by law shall be disqualified for service as a grand or petit juror in any court on account of race, color or previous condition of servitude, and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars."

As amended, Laws of 1945, Chapter 168, to delete the words "or previous condition of servitude", and to substitute in lieu thereof the words "creed, national origin or ancestry".

Although granted ample opportunity by the trial court, counsel failed to offer any testimony tending to prove that the procedure followed by the officials responsible for selecting jurors did in fact result in disproportional representation of Negroes on juries.

Assuming that proof of disproportional representation has been accepted as an element tending to establish systematic and arbitrary exclusion, the petitioners failed to submit any proof along that line, and it cannot be said that they had been precluded from submitting proof of that character.

We respectfully submit that the New Jersey Court of Errors and Appeals properly sustained the trial court's action in overruling the petitioners' challenge to the array, and in so doing it did not decide any Constitutional question of substance in a manner contrary to the decisions of this Court.

POINT TWO.

The petitioners' confessions were given voluntarily, and they were received in evidence by the trial court in accordance with the established law of New Jersey.

In sustaining the trial court's action in receiving their confessions in evidence, the New Jersey Court of Errors and Appeals decided the question in accordance with the established law of the State, and it did not decide any Federal Constitutional question of substance in any manner contrary to the decisions of this Court.

As we pointed out in our Counter-Statement of the Case hereinbefore, after Harris was arrested with a stolen car early the morning of December 7, and after giving his statement on the car's theft and his involvement in an assault and battery in another county the night before, he gave the

police important information concerning himself and the petitioners Cole and Hicks in connection with a series of other crimes as well as the Rudominer murder. As the result of his disclosures he was turned over to the Bandit Squad, and members of that squad took Harris on a tour of known haunts in Newark on the night of the 7th in search of these petitioners, who were arrested in their respective homes early the morning of Sunday, December 8th. There was no questioning by the police at all on Sunday, the 8th, and their investigation was resumed on the morning of the 9th.

Harris and petitioner Hicks were questioned on Monday the 9th with respect to the numerous other crimes, which involved the taking of the accused from their cells, their questioning, the sending for the respective victims, the arranging of various lineups, and the writing and signing of their statements. Harris gave the police seven statements, and petitioner Hicks fourteen statements relating to other crimes. Cole was taken to headquarters on Tuesday, the 10th, and he gave the police eight statements relating to other crimes.

Harris was the first to give his confession to the Bandit Squad on the Rudomine murder, which was completed early the morning of Tuesday, December 10th.

The petitioners' confessions to the Bandit Squad on the Rudominer murder were given on the afternoon of the same day.

On the night of the same date, December 10th, after the petitioners were turned over to the Police Homicide Squad and Prosecutor's Homicide Bureau, petitioner Cole gave his demonstrations of the manner in which he stomped Rudominer, after which all three gave their confessions of the Rudominer murder to the Prosecutor's Homicide Bureau and Police Homicide Squad.

At the trial, the State sustained its burden of proving that all of the confessions were voluntarily given. Each and every police officer and every witness who either participated in or witnessed the taking of the confessions testified to the voluntariness of all of the confessions.

As to petitioner Hicks, Lieutenant Flynn of the Bandit Squad testified that the first crime that Hicks admitted was the Rudominer killing, but that it was not taken until the investigation of all the other crimes had been completed, (R. 126). He testified that it was given voluntarily and that there were no promises or threats made to him, (R. 125, 173 to 175). In this he was corroborated by Detectives Smith and Donnelly of the same squad, who testified that there was no ill-treatement, acts of violence or threats, and no promise or hope of reward extended to Hicks by any member of their squad, (R. 291, 249, 127, 148, 149, 298, 303, 307, 308, 252).

As to petitioner Cole, Lieutenant Flynn likewise testified that his confession was given without threats of violence or promise or hope of reward, (R. 127, 172, 173, 175, 176, 177). In this he was corroborated by Detective O'Beirne, (R. 211, 232).

Petitioner Hicks took the witness stand in his own behalf on the question of voluntariness, and he related that he had been beaten with a rubber hose, that a rope was placed around his neck, that he had been denied medical treatment for an alleged venereal disease, and that vulgar and profane epithets were used, attributed to various detectives during the course of the giving of both his statements on other crimes and his confession on the murder.

Petitioner Cole took the witness stand in his own behalf and made a denial that he gave his statements voluntarily. He stated he was struck in the jaw by a Detective Cook as he was being taken away at the time of his arrest, and that

he was struck several blows by detectives, kicked and shoved around, subjected to profanity, and otherwise threatened, although in his cross-examination, when asked to explain why he signed the statements, he said that if he didn't do so "they were going to beat me up anyway," (R. 669).

The State, in rebuttal, called each and every police officer accused by the petitioners, and they categorically denied each and every act of alleged mistreatment, violence or threats, as well as any alleged promise or hope of reward attributed to them. (As to Hicks' accusations, see testimony of Detectives Smith, Cook, Flynn, O'Beirne, Donnelly, Guidera and Queenan, R. pp. 760-765, 772-774, 774-775, 775-776, 777, 778-779, 779-780.) (As to Cole's accusations, see testimony of Lieutenant Flynn and Detectives O'Beirne, Donnelly, Guidera, Queenan, Smith and Cook, R. 774, 775, 776, 777, 778, 779, 759-766, 772.)

There was no serious contention made by petitioners at the trial that their confessions of the Rudominer murder taken on the night of December 10th in Police Headquarters by the Prosecutor's Homicide Bureau and the Police Homicide Squad, were involuntary.

The petitioners admitted they were examined by the Assistant Police Surgeon on the night of December 10th as to any physical injuries, and they admitted they could show none. They also admitted being questioned by the impartial citizen-witness and that they made no complaint to him about any alleged beatings, ill-treatment, etc. They admitted they made no complaint on the night of the 10th either to the Police Chief, the Prosecutor, or any member of his staff in relation to any alleged mistreatment in connection with their confessions given to the Bandit Squad.

The alleged claims of beatings and mistreatment were not supported or corroborated by any evidence of any

kind, either direct or circumstantial. The alleged beatings were described as brutal, yet there was not one bit of circumstantial evidence to support the allegations.

Petitioner Hicks admitted he had been asked by the doctor, "Did they hit you down here?" and that he replied, "No, sir," (R. 585). He admitted, also, that in reply to the inquiries of the impartial citizen-witness he told him he had read his statement and that it was the truth, (R. 583); when asked if he had been threatened he said, "No;" and when asked as to how he had been treated by the police he said, "O.K.," (R. 584).

Petitioner Cole admitted that the impartial citizen-witness had asked him as to how he had been treated by the police and that he replied, "All right," (R. 700). He also admitted that he asked the Prosecutor, "Do you think I will get the electric chair for this?" his only explanation being that, "I wanted to know what was going to happen to me," (R. 698).

Further opportunity was afforded petitioners to deny the voluntariness of the confessions given, both to the Bandit Squad and the Prosecutor's Homicide Bureau and the Police Homicide Squad, when they were arraigned in open court upon the numerous complaints enumerated. They, however, pleaded guilty as to most, though not all of those charges, excluding the charge of murder to which a plea of guilty may not be accepted under the law of New Jersey.

The question of voluntariness of the confessions at the trial was in dispute, and the evidence as between the State and defendants was in conflict.

Under New Jersey law, the question of voluntariness of a confession is a preliminary question of fact for the trial judge, and upon acceptance thereof it becomes the function

of the jury to pass upon its credibility. (*Roesel* v. *State*, 62 N. J. L. 216; *State* v. *Jefferson*, 131 N. J. L. 70).

In the instant case, the trial judge fully complied with the requirements of New Jersey law relative to the question of the voluntariness of confessions, and after admitting petitioners' confessions into evidence as voluntary, the judge specifically left to the jury the question of the weight and credit to be attached to the confessions as well as the question of whether the confessions were in fact voluntary, with the instruction that if they did not believe the confessions to be voluntary they were to reject the same. (R. 1163). (*State* v. *Foulds*, 127 N. J. L. 336, 339; *State* v. *Morehous*, 97 N. J. L. 285, 291; *State* v. *Compo*, 108 N. J. L. 499-503; *State* v. *Jefferson, supra.*)

Under this rule in New Jersey, the appellate court on review will concern itself with the question whether there was a sufficiency of evidence to support the finding of the trial court on the question of voluntariness. (*State* v. *Morehous, supra*, p. 592; *State* v. *Compo, supra; State* v. *Ciemiengo*, 116 N. J. L. 402.)

There was abundant evidence in the case to justify the trial judge in concluding that the confessions were voluntary; and the New Jersey Court of Errors and Appeals, in reviewing the entire record of the proceedings under statutory authority,[8] was justified in concluding that there was sufficient evidence to support the trial judge's finding that the confessions were voluntary.

It is respectfully submitted that the rule in New Jersey on this question is in accord with the holdings of this Court as enunciated in the case of *Lyons* v. *Oklahoma*, 322 U. S. 586 (1944)[9], decided by this Court subsequent to its decisions

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[8] N. J. S. A. 2:195-16.

[9] (p. 602): "When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid

in *Chambers* v. *Florida, infra; Lisenba* v. *California, infra; Ashcraft* v. *Tenn., infra.*

It is our contention that petitioners were not coerced into giving their confessions, and there is nothing in the record to indicate a violation of due process.

The case is clearly distinguishable from the facts and circumstances of the cases cited by petitioners in their brief, (p. 19).

In *Haley* v. *Ohio,* 68 S. Ct. 302, a 15-year old Negro boy was involved. His confession was obtained after five hours of sustained questioning by relays of police. He was photographed by a newspaper reporter immediately after he signed the confession. He was held incommunicado for three hours before he was taken before a magistrate, during which time a lawyer hired by the boy's mother was twice refused permission to see him. The mother was not permitted to see him until five days after the signing of the confession. These were facts proven, without contradiction by the State. This Court disregarded the disputed facts relating to alleged beatings at the hands of the police, and rested its conclusion upon the uncontroverted facts herein alluded to. It is to be noted, too, that it was the boy's tender age that motivated this Court in carefully scrutinizing the record on the question of whether there was a violation of due process when it said, (opinion, p. 304, top), "He cannot be judged by the more exacting standards of maturity;" and, "The age of petitioner, the hours when he was grilled,

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responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision. *Lisenba* v. *Calif., supra,* 314 U. S., p. 238, 62 S. Ct., p. 290, 86 L. ed. 166."

the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction," (opinion, p. 304).

In our case, Hicks was 21 and Cole was 23 years old, respectively, when they committed this murder. Both admitted previous criminal records at the trial, Hicks having had three previous convictions for robbery in 1942, (R. 639); Cole also admitted previous convictions for robbery; and both admitted to their previous joint association in crime, (R. 724, 727).

In *Malinski* v. *New York,* 324 U. S. 401, (cited by petitioners), the defendant, upon his arrest, was taken to a hotel room and compelled to strip and remain naked for several hours. Then he was allowed to put on socks, shoes and underwear, and he was given a blanket in which to wrap himself. In the afternoon he was permitted to talk with a former fellow criminal whose acquaintance he had made in prison. That evening he made an oral confession to the police which was the subject at issue. In reversing the conviction, this Court relied primarily upon the unjustified remarks of the District Attorney in his summation to the jury, as follows, page 405 of opinion:

> "* * * For in his summation to the jury he made certain statements which the Court of Appeals said were 'indefensible.' * * * and which we think are sufficient to fill any gaps on the record before us and to establish that his confession was not made voluntarily. He said that Malinski 'was not hard to break;' that 'He did not care what he did. He knew the cops were going to break him down.' And he added * * * 'Why this talk about being undressed? Of course they had a right to undress him to look for bullet scars, and keep the clothes off him. That was

quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking.'

"If we take the prosecutor at his word, the confession of October 23rd was the product of fear—one on which we could not permit a person to stand convicted for a crime."

That is not the situation here. Questioning of Harris and Hicks on a series of stickups consumed all of Monday, December 9 and part of December 10. Harris gave 8 statements and Hicks 14 pertaining to other crimes. Cole was not questioned on other crimes until December 10, and it was not until the afternoon of that day that he was questioned on the Rudominer killing. There was no such ill-treatment as indicated in the *Malinski* case, where the accusations were not only undisputed by the State, but the District Attorney attempted to justify the actions of the police before the jury.

In *Ashcraft* v. *Tennessee,* 322 U. S. 143 (cited by petitioners), the defendant was held incommunicado for 36 consecutive hours without rest or sleep, and the confession was wrung from the defendant under circumstances that were clearly in violation of due process.

In *Chambers* v. *Florida,* 309 U. S. 227 (cited by petitioners), the defendants, arrested under mere suspicion, were subjected to questioning for 5 days and nights, without food or rest, and continuously surrounded by officers and citizens friendly to the police. When the first confession was extracted from one defendant and submitted to the Prosecutor, he refused to accept it, stating it wasn't enough. From the time of their arrest down to the time of sentence, the defendants were never removed from the constant

observation, influence, custody and control of the same officers whose persistent pressure brought about the "sunrise confessions." They were obtained under circumstances, as this Court stated, "calculated to break the strongest nerves and the stoutest resistance."

In *Lisenba* v. *California,* 314 U. S. 219 (cited by petitioners), the rule was established that where there is conflicting evidence as to the methods used in obtaining a confession and an issue arises as to whether there has been violation of due process, this Court will not disturb the determination of the triers of fact in the courts below, "unless such determination is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process."

In our case there was conflicting evidence as to the method employed in obtaining the confessions. On the one hand were these petitioners, two adult and mature individuals who admittedly had committed previous crimes in association with one another; and on the other, were police officers, intelligent and experienced in the performance of their duties and obligations. The issue of credibility was posed squarely before the trial judge and jury who saw and heard the witnesses. They and the Appellate Court were familiar with the general conditions and standard of law enforcement of the community.

We submit that there is no merit to petitioners' assertion (petitioners' brief p. 19) to the effect that the conviction was based solely upon their own confessions. There was conclusive evidence that a robbery had been attempted and that Rudominer was killed in the course of the perpetration of that crime; that a Negro had been seen "messing" with the cash register by the witness Mrs. Brandon; that two Negroes were seen fleeing from the scene after the commission of the crime by the witnesses Brandon and

Adams; that they were pursued by the witnesses White and Adams; that they were seen to be wearing an Eisenhower jacket and a red and black checked shirt, respectively, admitted in evidence at the trial of this case; that the petitioner Cole was accused of stomping Rudominer by the petitioner Hicks and their co-defendant Harris; that the petitioner Cole gave two physical demonstrations of how he stomped Rudominer, one to the Police Chief and a second at a later time to Prosecutor's Detective-Captain; that the petitioner Cole asked the Prosecutor if he would get the chair for this crime.

Our Court of Errors and Appeals considered all of this corroborative evidence and concluded, p. 610, of the opinion below (136 N. J. L. 606, 610, 56 A. 2d 898, 901):

> "There is cogent evidence in this case, aside from the confessions, that the decedent Rudominer met a felonious death. The testimony of eye witnesses as to many details corroborates and is corroborated by the confessions. There is ample proof of the *corpus delicti*. The law of this state is settled that if death, through a criminal agency be proved, and a man confesses to having caused the death, such proof will support a conviction of murder. *State* v. *Kwiatkowski*, 83 N. J. L. 650, 660; *State* v. *Banusik*, 84 Id. 640, 647; *State* v. *James*, 96 Id. 132, 147."

On the Right to Assistance of Counsel.

Petitioners complain of the conclusion of the New Jersey Court of Errors and Appeals on the question of their right to assistance of counsel and the failure of the police to caution them as to such right before the confessions were taken.

They quote an excerpt from the opinion below, (petitioners' brief, pp. 15, 22), wherein the court approved of the

trial court's action in excluding evidence tending to show a failure on the part of the police to give the petitioners cautionary instructions before taking their statements.

The record is devoid of any evidence that petitioners had sought the aid of counsel, or that any counsel had been denied access to them.

It is established in New Jersey that a confession to be admissible must be voluntary, and that the term "voluntary" has been construed to mean that the confession was not extorted by any sort of threats or violence, or obtained by any direct or implied promises (*Roesel* v. *State*, 62 N. J. L. 216).

It also has been established that no presumption that illicit methods had been employed can arise from the fact of custody, standing alone; although, the fact of custody may be considered in connection with the facts and circumstances of each case. It is only where an inference arises from other circumstances tending to show involuntariness, that the state need, among other things, show that the prisoner, before making the statement sought to be proved against him, had been informed that he was not under any compulsion to speak, and that if he chose to speak, he did so without any inducement being offered to him (*State* v. *Hernia*, 68 N. J. L. 299).

The facts proven in the instant case did not give rise to any inference of illicit methods having been used. The state sustained its burden of showing that the confessions were voluntarily given; the defendants claimed they were subjected to threats and violence; and the state entered a rebuttal to each and every claim made. It was purely a matter of credibility for the judge and jury. There was no room for any inference of involuntariness, and the state was not called upon to prove any previous cautionary instructions.

On the right to aid and assistance of counsel, the court below affirmed the well-established rule in New Jersey, when it stated that "A prisoner is only entitled to counsel to aid him in his defense," and not to save him from his own voluntary acts.

We respectfully submit that the ruling was an accurate statement of the law, and not in conflict with any decision of this Court on any Constitutional question of substance.

The Sixth Amendment to the Federal Constitution provides, inter alia, that in all criminal prosecutions the accused "shall enjoy the right" to have the assistance of counsel for his defense. This right is not that he have the assistance of counsel from the time of his arrest, but only for his defense, which, obviously implies the right to assistance when put in jeopardy on his trial, and that counsel shall have reasonable access to the prisoner for the purpose of preparing his defense. Such right cannot be construed to mean that an accused shall have the benefit of counsel to advise him as to whether or not he shall confess. Confession is a thing entirely apart from defense upon a trial. (*State* v. *Murphy,* 87 N. J. L. 515).

We know of no legal doctrine to the effect that a confession that is otherwise legal because it was voluntarily given is rendered involuntary because counsel or members of the prisoner's family were not present at the time it was made.

It is to be observed that in the instant case the trial court provided petitioner Cole with two counsel long before the trial in accordance with statutory authority.[10] Petitioner Hicks provided his own counsel.

When petitioners were arraigned before the magistrate, pleas of not guilty to the complaint for murder were

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[10] *N. J. S. A. 2:190-3.*

entered for them as required by law, and they were immediately remanded to the county jail to await action of the grand jury.

It is stated, at page 22 of petitioners' brief, that the trial court precluded a showing that petitioners were not represented by counsel at the arraignment. The ruling of the court objected to was made in connection with the examination of Harris who does not join in this petition, (R. 550). However, we submit that the same principle hereinbefore discussed applies here; namely, that an accused's Constitutional right to assistance of counsel is limited to interposing his defense when put upon his trial, and not at a mere arraignment before the magistrate on a complaint (*State* v. *Murphy, supra*).

Williams v. *Kaiser,* 323 U. S. 471, 65 S. Ct. 363 (cited by petitioners in footnote, p. 22), is not in point. There the defendant requested counsel at the time he was put on trial on the indictment, and his request was not complied with because of failure of compliance with the provisions of the pertinent statute, with the result that defendant entered a plea of guilty. This Court held he had been denied his Constitutional right to assistance of counsel upon his trial on the indictment, even though the state appellate court held that the trial court had not violated the statute.

Petitioners make the statement, (petitioners' brief, p. 6), that they were not arraigned before the magistrate until five full days after their arrest; and in the footnote on the same page, they quote a New Jersey statute, tending to indicate that there had been a violation of that statute.[11]

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[11] *N. J. S. A. 2:216-9* is included in the subtitle on "Police Courts and Magistrates," and the section is titled, "Keepers of places of detention in certain municipalities to detain prisoners for hearing."

The statute referred to had no application to this case. Its provisions apply to the case where a prisoner has been arraigned formally before a magistrate and a hearing or preliminary examination is yet to be had upon the complaint. In such case, provision is made for the temporary detention in a local municipal lockup which shall not be for a longer duration than 48 hours. Temporary detention in any municipal lockup in the interim between arraignment and hearing on the complaint shall not be for more than 48 hours.

In our case the petitioners had been held in headquarters until the police investigation of the murder and numerous other crimes with which they were also charged had been completed, after which they were formally arraigned before the magistrate. There was no hearing or preliminary examination on the complaint and none was requested, and petitioners were immediately remanded to the county jail to await the action of the grand jury.

We, therefore, respectfully submit there is no substance in petitioners' complaint that they have been denied due process of law on this ground.

VI.

Conclusion.

For the reasons set forth in this brief, we respectfully submit the writ of certiorari should be denied the petitioners.

Respectfully submitted,

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